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U.S. Citizenship and Immigration Services

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[redacted]

MAR 11 2004

FILE: WAC 02 200 51315 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a theme park and commercial building project design firm. It seeks to employ the beneficiary permanently in the United States as a Landscape Designer. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *(2) Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. The petition's priority date in this instance is May 28, 1998. The beneficiary's salary as stated on the labor certification is $67,288 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated September 5, 2002, the director required additional evidence to establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Counsel responded to the RFE with a letter dated February 12, 2003 accompanied by additional evidence.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition in a decision dated February 20, 2003.

Counsel filed a timely notice of appeal, which was received by the director on March 19, 2003. Counsel submits no separate brief on appeal, but submits additional evidence with the notice of appeal.

All of the evidence submitted with counsel's Notice of Appeal is being submitted for the first time on appeal. Counsel makes no claim that the newly-submitted evidence was unavailable previously, nor is any explanation offered for the failure to submit this evidence prior to the decision of the district director.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988), where the BIA stated as follows:

> Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

In the instant case, the evidence submitted on appeal relates to the petitioner's ability to pay the proffered wage. The petitioner was put on notice of the need for evidence on that issue by the regulation quoted on page two above, which specifies the period of time which should be covered by such evidence and the types of acceptable evidence.

In addition to the regulation, the petitioner was put on notice of the types of evidence needed to establish its ability to pay the proffered wage by published decisions of the AAO and its predecessor agencies, including *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Moreover, in the instant case, the petitioner was put on notice by the director in the RFE dated September 5, 2002 that the evidence which it submitted with its I-140 petition was insufficient concerning the petitioner's ability to pay the proffered wage. With regard to the petitioner's ability to pay, the RFE mentioned that evidence on certain years was required, namely evidence on the years from 1998 to the present.

The petitioner therefore was given reasonable notice by regulation, by case law, and by the RFE in the instant case of the need for evidence concerning the petitioner's ability to pay the proffered wage.

One of the documents newly submitted on appeal is a Form I-797 of March 11, 2003 notifying the petitioner of the transfer of the case to the AAO. This transfer occurred prior to the filing of the notice of appeal and the record does not indicate the reason for transferring the case prior to the filing of a notice of appeal. Since this document was not available prior to the director's decision the AAO will accept it as evidence on appeal, though it does not appear to be relevant to the merits of the appeal.

Another piece of newly-submitted evidence is the W-2 form for the beneficiary for 2002. This document should have been issued to the beneficiary in January 2003, a few weeks prior to the director's decision of February 20, 2003, but perhaps it was not issued by that date. The AAO will accept this document as evidence on appeal.

A third piece of newly-submitted evidence is a letter from Jeffrey H. Haskett, CPA, dated March 17, 2003, a date after the date of the director's decision. Mr. Haskett's letter is a review of the petitioner's financial condition from 1998 to the date of the letter, and it contains no indication of any reason why such an analysis could not have been done prior to the date of the director's decision covering the matters up to that time. Other newly-submitted evidentiary documents are a summary of bank statement cash balances for the years 1998 through 2002 plus the first two months of 2003, and copies of the first pages of bank statements for the petitioner for those same years and months. Counsel offers no explanation on why such evidence could not have been submitted prior to the date of the director's decision for matters up to that time.

For the reasons discussed above, only the Form I-797 and the W-2 form for the beneficiary for 2002 will be considered as evidence on appeal. The other evidence submitted for the first time on appeal will not be considered for any purpose.

Turning to the director's decision, the following is noted. The director analyzed the petitioner's tax returns and found that in 1998 the taxable income was $251,803, in 1999 it was $15,875, in 2000 it was $22,086 and in 2001 the taxable income was $119,871, with cash assets of $34,580. The director found that these amounts were insufficient to pay the proffered wage of $67,288 for each relevant year.

The director's analysis of the tax returns was inaccurate for the years 1998, 1999 and 2000. The director failed to recognize the significance of the brackets around the taxable income figures for those years, which indicate negative numbers. Moreover, for those years the director looked to the taxable income figures after the net operating loss deduction and special deductions, rather than the taxable income figures before those deductions.

Counsel's notice of appeal states that the beneficiary has been employed by the petitioner during the years at issue. This information is supported by evidence in the record. The ETA-750B submitted on May 28, 1998 states that the beneficiary was employed by the petitioner from February 1998 to the present. The record includes copies of U.S. H-1B visas issued to the beneficiary in Tokyo, Japan on February 12, 1998 and on January 17, 2001 with the petitioner shown as the employer on each visa. Also in the record are W-2 forms for the beneficiary for the years 1998, 1999, 2000, and 2001, plus the W-2 form for 2002 newly submitted on appeal. Each of these forms shows wages, tips or other compensation paid by the petitioner to the beneficiary.

Counsel asserts that the presence of the beneficiary on the payroll of the petitioner from February 1998 to the present must be considered in evaluating the ability of the petitioner to pay the proffered salary from the May 28, 1998 priority date to the present. Counsel asserts that the petitioner's tax returns need only show the petitioner's ability to pay the difference between the beneficiary's actual salary and the proffered wage in each of the years at issue. The AAO concurs with counsel on these points.

The director made no analysis of the W-2 forms for the beneficiary submitted in evidence. For wages, tips and other compensation the W-2 forms show $50,000 in 1998, $60,000 in 1999, $60,000 in 2000, $60,000 in 2001 and $65,000 in 2002. The difference between these amounts and the proffered wage of $67,288 in each year was $17,288 in 1998 (the year when the petitioner began work sometime in February), $7,288 in 1999, $7,288 in 2000, $7,288 in 2001 and $2,288 in 2002.

When considering whether a petitioner's income is sufficient to pay the proffered wage, the AAO looks principally to the taxable income before net operating loss deduction and special deductions. The returns show this figure to be -$11,720 for 1998, -$15,875 for 1999, -$22,086 for 2000 and $119,871 for 2001. Since the taxable income before net operating loss deduction and special deductions was negative for the years 1998, 1999 and 2000, those figures fail to show the ability of the petitioner to pay the difference between the beneficiary's salary and the proffered wage for those years.

As an alternate basis for evaluating a petitioner's ability to pay the proffered wage the AAO considers the net current assets of the petitioner. The director made no analysis of the petitioner's assets and liabilities for the years in question. The petitioner included copies of the Schedule L attachments with each year's return. The petitioner's Schedule L for 1998 shows current assets of $56,052. For 1999 the Schedule L shows current assets of $59,816. For 2000 the Schedule L shows current assets of $44,770. For 2001 the Schedule L shows current assets of $31,776. Each of those Schedule L's lists no current liabilities.

The figures on the Schedule L's attached to the petitioner's tax returns therefore yield net current assets of $56,052 for 1998, $59,816 for 1999, $44,770 for 2000 and $31,776 for 2001. These amounts are more than sufficient to pay the difference between the beneficiary's actual salary and the proffered wage for each year. The petitioner's tax return for 2002 was not submitted in evidence, but the 2002 tax return was not yet due as of the February 20, 2003 date of the director's decision nor as of the March 19, 2003 date of the filing of the petitioner's notice of appeal. The petitioner did submit into evidence with the notice of appeal a copy of the beneficiary's W-2 form for 2002, which shows total wages paid to the beneficiary that year of $65,000. As noted

above, the difference between the beneficiary's actual salary that year and the proffered wage was $2,228. The fact that the petitioner's tax return for 2001 showed taxable income before net operating deduction and special deductions of $119,871 and net current assets at the close of the year of $31,776 is sufficient evidence that the petitioner had the ability to pay the $2,228 difference in 2002, even after paying the $7,288 difference in 2001 between the beneficiary's actual wages that year and the proffered wage.

The AAO notes that petitioner's tax returns contain certain discrepancies. On the petitioner's tax return for 1998 the taxable income before net operating loss deductions and special deductions is a negative figure, -$11,720. From this figure the petitioner deducted a net operating loss of -$240,083, to yield a taxable income of -$251,803. This deduction was an error, since the net operating loss deduction may be used only to reduce a positive taxable income to zero. It may not be used to reduce a negative taxable income to an even lower negative taxable income. See, IRS, Publication 536, Net Operating Losses (Tax year 1998), page 10, available on the Internet at http://www.irs.gov/pub/irs-98/p536.pdf. The petitioner's taxable income after the net operating loss deduction and special deductions therefore should have been entered as -$11,720, rather than as -$251,803. This error, however, does not directly affect the analysis in the instant case, since the AAO looks to the taxable income before the net operating loss deduction and special deductions when evaluating a petitioner's ability to pay the proffered wage.

Another inconsistency in the petitioner's tax returns is that the petitioner's Schedule L for 1998 shows total assets at the end of the year as $57,214, while the petitioner's Schedule L for the succeeding year of 1999 shows beginning total assets as $105,980. The discrepancy appears to result from the double listing of the figure $48,766, which appears on the Schedule L for 1999 both on line 3 for inventories and on line 14 for "other assets." Nonetheless, even if it were assumed that this amount should be subtracted from net current assets for 1999, the petitioner's net current assets for that year, both at the beginning and the end of the year, would still be sufficient to have paid the difference of $7,288 between the beneficiary's actual wages that year and the proffered wage.

The exact nature of the petitioner's "other assets" is not clear from the 1999 return nor from the petitioner's other returns in evidence. Schedule 8 on the 1999 return shows the description of other assets as "development," a description also given on the 2000 and 2001 returns for "other assets." It appears from other evidence in the record that the petitioner's business consists at least in part in the development and use of computer software for commercial landscape design. A letter dated September 22, 1997 confirming the beneficiary's prior work experience in Japan from 1992 to 1994 includes among her duties "making construction maps, using computers and CAD." Another letter dated May 21, 2002 signed by the beneficiary herself in her capacity as president of Arte Bella Japan, Inc and confirming her work experience in Japan from 1995 to 1998 includes among her duties to "use architectural graphic program to prepare comprehensive and effective presentation material for clients." The petitioner's tax returns for 1998, 1999 and 2001 describe the type of business as "hybrid," while the petitioner's tax returns for 2000 describe the type of business as "software."

Although the petitioner's tax returns show significant losses for 1998, 1999 and 2000 in taxable income before the net operating loss deduction and special deductions, the return for 2001 shows a significant positive taxable income before those deductions. Moreover, the net current assets for each of those years were more than sufficient to pay the difference between the beneficiary's actual wages in each of those years and the proffered wages. The figures on the 2001 return are also sufficient to establish the petitioner's ability to pay the difference between the beneficiary's actual wage in 2002 and the proffered wage.

Some evidence in the record raises concerns on whether the petitioner is independent of the beneficiary. The petitioner's tax returns for 1998 through 2001 show deductions for salaries and wages in amounts either equal to or only slightly higher than the beneficiary's wages in those years. These figures indicate that the beneficiary was either the only employee or the only full-time employee of the petitioner during the years 1998 through 2001. The AAO also notes that the address of the beneficiary shown on the beneficiary's W-2 forms is the same as the

address of the petitioner. According to the petitioner's tax returns, 100% of the shares of the petitioner are owned by a single individual, Mayuki Yanagawa. Two of the letters attesting to the beneficiary's prior relevant work experience in Japan state that some of that experience was obtained working for a corporation of which she owned 100% of the shares and for which she served as president. The name of that corporation, Arte Bella Japan, Inc., is very similar to the name of the petitioner, Arte Bella, Inc.

Nonetheless, a Los Angeles tax registration certificate for the petitioner in the record is dated February 13, 1996, about two years before the beneficiary began working for the petitioner in February of 1998. In addition, the petitioner's tax return for 1998 shows net operating losses carried forward from 1994, 1995 and 1997. These facts indicate that the petitioner was carrying on business prior to the employment of the beneficiary in February 1998.

For the foregoing reasons, the AAO concludes that the petitioner has established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence. The AAO also concludes that the petitioner is a bona fide corporate entity independent of the beneficiary.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained. The petition is approved